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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 80704WD

JUDGE RODRIGUEZ

THE STATE OF FLORIDA :
 :
 Plaintiff, :
 vs. :
 AMY ALLAN, :
 :
 Defendant. :

Civic Park Plaza
1469 Northwest 13 Terrace
Miami, Florida 33125
November 10, 1994
2:00 p.m.

DEPOSITION

of

RICK SWOPE

Taken before Dorothy Edwards, Court Reporter and
Notary Public in and for the State of Florida at Large,
pursuant to Notice of Taking Deposition filed in the
above-styled cause.

* * *

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APPEARANCES:

KATHERINE F. RUNDLE,
State Attorney,
BY: STEPHEN TALPINS, ESQ.
MICHAEL E. GILFARB, ESQ.
Assistant State Attorneys,
on behalf of the State.

LAW OFFICES
ESSEN & ESSEN, P.A.
BY: CARLOS A. CANET, ESQ.
Glendale Federal Building
18305 Biscayne Boulevard
North Miami Beach, Florida 33160
on behalf of the Defendant.

I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>
RICK SWOPE	3	

CERTIFIED QUESTIONS

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1 THEREUPON:

RICK SWOPE,

2 was called as a witness and, having been duly sworn, was
3 examined and testified as follows:

4
5 DIRECT EXAMINATION

6 BY MR. TALPINS:

7 Q. We are here on the deposition in State vs. Amy
8 Allan, 80704WD. My name is Stephen Talpins, T-a-l-p-i-n-s.
9 Also in the room is Michael Gilfarb, Carlos Canet, C-a-n-e-t,
10 attorney for the defendant and Rick Swope, who is the witness
11 being deposed, S-w-o-p-e.

12 Mr. Swope, have you ever given a deposition before?

13 A. Yes.

14 Q. So you understand I am just basically going to ask
15 you a series of question?

16 A. Yes.

17 Q. If there is anything you don't understand about
18 them, please stop me and I will be happy to explain them.

19 A. That's correct.

20 Q. If at any time you feel I am being unfair or doing
21 anything improper, feel free to speak up and let me know.

22 A. I will.

23 Q. Mr. Swope, as you know, the case came up in front
24 of Judge Rodriguez in August on the defendant's motion to
25 quash the State's subpoena.

1 At that time Judge Rodriguez ordered you to present
2 us all documents or materials which in any way memorialize
3 experiments conducted by or you supervised yourself on the
4 intoxilizer regarding the accuracy and reliability of the
5 instrument in the past three years.

6 And the judge amended that to -- excuse me, in the
7 past three years, yes.

8 v Do you have any documents for us at this time?

9 A. No.

10 Q. Are there any such documents?

11 A. Yes.

12 Q. Why don't you have them?

13 A. Because I am not in possession of the documents.
14 They are not mine.

15 Q. Are you capable of obtaining these documents?

16 A. Well, I don't know what you mean by am I capable of
17 taking them without permission, yes. Am I capable of getting
18 the documents myself, no. Not without permission. The
19 documents aren't mine.

20 Q. Where are the documents?

21 A. With Richard Essen.

22 Q. That's Essen & Essen law firm?

23 A. Yes.

24 Q. That's the law firm Mr. Canet works in?

25 A. Yes.

1 Q. Did you ask him for these documents?

2 A. Yes.

3 Q. Can you tell us how you attempted to comply with
4 the court's order?

5 A. Well, Mr. Reiff gave me a copy of the subpoena or
6 subpoenas. I think I was given a couple over a period of a
7 few weeks when everybody was battling back and forth. And
8 after I received the subpoenas, I gave a copy to Mr. Canet
9 or -- I can't say I gave a copy to him, but one was faxed to
10 his office through Bobby Reiff. And I had a copy.

11 And I went to Mr. Essen and told him that I was
12 requested to produce any documents that I have involving his
13 machine, and he stated no he is not giving me those
14 documents.

15 Q. You said something interesting. And I just want to
16 clarify. You referred to it as his machine.

17 Are you also part owner of that machine?

18 A. No.

19 Q. Were you ever part owner of that instrument?

20 A. When the instrument was in the process or the
21 machine was in the process of being purchased, I made the
22 arrangement for it.

23 I was going to be a part owner of the machine, but
24 because of Mr. Essen's request to purchase the whole machine
25 himself, he decided to purchase it himself.

1 Q. So it's your testimony here today that you are not
2 a part owner of the instrument, and you never have been; is
3 that correct?

4 A. I am not going to say I never have been. I am
5 going to say I made the arrangement to purchase it. The
6 machine was sent to me. It was my understanding, initially,
7 that I was going to be a part owner. And Mr. Essen decided
8 to purchase the whole machine himself, and that's what he
9 did.

10 Q. Were you at any time a part owner of the
11 instrument?

12 A. I already answered that.

13 MR. GILFARB: Can I narrow it down to a specific
14 time.

15 BY MR. GILFARB:

16 Q. On September 21, 1993 or thereabout, were you a
17 part owner of that machine?

18 A. I don't know.

19 BY MR. TALPINS:

20 Q. When was the instrument purchased? You don't
21 recall?

22 A. No.

23 Q. Can you give us an estimation?

24 A. No.

25 Q. Was it 1994?

1 A. I don't know.

2 Q. You don't know if it was 1994?

3 A. No.

4 Q. 1993?

5 A. I don't know.

6 Q. Approximately, how long Essen & Essen possessed the
7 instrument?

8 A. I don't know.

9 BY MR. GILFARB:

10 Q. Who did you speak with when it was time for you to
11 bring those documents, which were ordered by the court?

12 A. Mr. Essen.

13 Q. Richard Essen?

14 A. Yes.

15 Q. What did Richard Essen tell you?

16 A. I already testified to that.

17 Q. I think you said generally he wouldn't give it to
18 you?

19 A. That's what he said.

20 Q. He said I am not going to give them to you?

21 A. Yes.

22 Q. Did he claim they were work product? Did he give
23 you any reasons? A better question would be --

24 MR. CANET: I am going to object.

25 MR. TALPINS: You can answer the question.

1 THE WITNESS: Certify the question.

2 MR. GILFARB: That's the first question certified.

3 BY MR. GILFARB:

4 Q. What did he tell you when he refused to give you
5 those documents?

6 A. I already stated that twice.

7 Q. The record has to be clear.

8 My question is -- and the one that's been certified
9 is, what did Richard Essen tell you the reason was for not
10 giving them over?

11 What was his explanation for not giving them over?

12 MR. GILFARB: We agree that's the certified
13 question?

14 MR. CANET: Yes.

15 BY MR. TALPINS:

16 Q. The experiment you conducted on the instrument,
17 were you paid to do those experiments, or did you do them
18 yourself?

19 MR. CANET: Objection.

20 THE WITNESS: Certify that.

21 BY MR. GILFARB:

22 Q. When you did these experiments, did you do them in
23 connection with any case?

24 MR. CANET: Objection.

25 MR. TALPINS: I would like to know the nature of

1 those objections.

2 MR. CANET: I don't have to explain the nature.

3 MR. GILFARB: You are not going to answer the
4 question of -- not which case, but whether they were
5 done in connection with the case?

6 MR. CANET: That's correct.

7 MR. GILFARB: I believe you cannot tell him not to
8 answer. You can state your objections.

9 I am asking if you are not going to answer a
10 question when it doesn't call for who the person was,
11 but whether it was done in connection with their case?
12 That's the question as of this point.

13 MR. CANET: I object. But go ahead and answer the
14 question, Rick.

15 THE WITNESS: Give me the question again.

16 BY MR. GILFARB:

17 Q. Were these experiments done in connection with
18 somebody's particular case?

19 Every time you did an experiment, was it in
20 connection with somebody's particular case?

21 A. There could be cases that were and cases that
22 weren't. It depends.

23 Q. Off the top of your head. I don't see any notes in
24 front of you.

25 A. I do have notes in front of me.

1 Q. What do you have?

2 A. This is mine.

3 Q. What is it?

4 A. They are notes that I wrote today.

5 Q. Well, off the top of your head or through your
6 notes, do you know which experiments were done in relation to
7 a specific case and which were not done in relation to a
8 specific case?

9 MR. CANET: I object, but answer the question.

10 THE WITNESS: Without going through my records and
11 finding out what type of experiments were done or what
12 type of testing was done, I could not tell you that.

13 BY MR. TALPINS:

14 Q. What kind of records do you have?

15 A. I have office records and I have case records of
16 all the cases or most of the cases I've worked on. I have
17 manuals and certifications of the classes I have been to.

18 Q. What kind of records of your experiments do you
19 have?

20 A. Well, I --

21 MR. CANET: Do you mean in his possession?

22 MR. TALPINS: I think he understands the question.

23 He started answering it.

24 MR. CANET: You need to be clear. The question
25 isn't objected to. You just need to be clear.

1 BY MR. GILFARB:

2 Q. Just to be clear, the question is, off the top of
3 your head, can you think of which experiments were conducted
4 in relation to the case and which ones were not?

5 And you said if you looked at your notes or your
6 records that you would be able to determine that. Is that
7 true?

8 A. That's correct.

9 Q. Now, where are those records?

10 A. Well, it depends. If I do a particular study or
11 experiment on a case, that will be in the case file. If I do
12 an experiment for different cases or for example, Mr. Essen's
13 office, those documents are in his possession.

14 If I do testing at the police academy or during a
15 class, that information is retained by the police academy.

16 MR. GILFARB: Off the record.

17 (Off the record discussion.)

18 MR. GILFARB: Back on the record.

19 BY MR. GILFARB:

20 Q. Those which you say are in the case file, do you
21 mean the case file that the lawyers use or the case file
22 which you would use?

23 A. I may have a notation in my file as to times such
24 as for billing and other purposes or if requests were made.

25 But the actual results of that testing would be

1 given to the attorney. The original and the copies would be
2 retained by that particular attorney, whoever it maybe.

3 Q. Would it be fair to say that all the work which you
4 do whether it's in connection with the particular case or not
5 ends up in the hands of the law firm of Essen & Essen?

6 A. No. Absolutely not.

7 Q. Then what work do you do that you have personal
8 records of? Records which would explain the nature of the
9 experiments and the results of the experiments. Let me make
10 it specific to that.

11 A. Well, it's hard to answer that question because if
12 I am retained or requested by an attorney to perform a
13 particular experiment with a machine, the results of that
14 experiment go to that particular attorney.

15 If there is something that comes out of that
16 experiment that I may testify to in another trial, that
17 information will be retained in my notes.

18 And I will either use that when I write a paper, or
19 I will make a notation to go back to that file, pull that
20 information and possibly recontact the attorney for copies of
21 cards and documents and/or anything, and then use that in a
22 paper I may write. I maintain very few records other than
23 time records. And what I may do --

24 Q. So would it be fair to say those experiments you do
25 for Essen & Essen, those results end up in their file or in

1 their custody, care and control, unless you request it back
2 if you are going to write some kind of paper or a copy
3 thereof?

4 A. Yes. But those are if I am retained by the firm of
5 Essen & Essen. Obviously, the work I do goes back to them.

6 BY MR. TALPINS:

7 Q. I want to make sure I understand. You are saying
8 you do keep some notes of your experiments?

9 A. I keep some notes that may refer me to test results
10 if I am going to write an article or particular field of
11 inquiry on the machine. I may keep that and make notes.

12 Q. Have you made any of these kinds of notes in the
13 past three years?

14 A. Yes.

15 Q. They are not with you here today; is that correct?

16 A. No.

17 Q. When we had the hearing back in August, Mr. Reiff
18 was representing you?

19 A. He's still representing me.

20 Q. And prior to that hearing, you had attended a
21 meeting with Mr. Reiff and discussed with him the nature of
22 the state's subpoena and what exactly we were asking for?

23 MR. CANET: Objection.

24 THE WITNESS: Certify the question.

25 BY MR. TALPINS:

1 Q. Mr. Reiff tendered to the court you have voluminous
2 records.

3 Is that based on the conversation with you, or is
4 that something he speculated about?

5 MR. CANET: Objection.

6 THE WITNESS: Certify the question.

7 BY MR. GILFARB:

8 Q. Were you instructed today that every time counsel
9 for defense objects to certify the question?

10 A. No.

11 Q. You gained that particular skill through previous
12 depositions?

13 MR. CANET: I am objecting.

14 MR. GILFARB: Your objection is noted.

15 THE WITNESS: I don't know what you are talking
16 about.

17 BY MR. GILFARB:

18 Q. Did you learn to do that in your experience with
19 prior depositions?

20 A. With who?

21 Q. I didn't qualify it.

22 A. I can't answer the question. I don't know what you
23 are talking about.

24 Q. You can't answer the question?

25 A. It doesn't make sense to me.

1 Q. Where did you learn the phrase "certify the
2 question?"

3 A. Where did I learn that phrase?

4 Q. Where did you learn that phrase certify the
5 question?

6 A. I don't know. Maybe from watching Matlock or
7 something.

8 BY MR. TALPINS:

9 Q. Let me ask you a couple of questions about field
10 sobriety tests before we start with the intoxilizer.

11 MR. CANET: Let me make the record real clear. He
12 is going to be testifying in Amy Allan's case in a
13 specific area, nothing else.

14 As far as I am concerned, this is irrelevant, and I
15 am going to continue to object to the questions. That
16 has nothing to do with what he is going to testify in
17 Amy Allan's case.

18 MR. TALPINS: That's fine.

19 MR. GILFARB: He is an expert. Even the --

20 MR. CANET: He is not testifying on field sobriety.

21 MR. GILFARB: May I speak?

22 MR. CANET: I am going to keep objecting.

23 MR. GILFARB: I am quiet when you speak. He is
24 being called not as a lay person. He is being called as
25 an expert.

1 MR. CANET: No, he is --

2 MR. GILFARB: May I finish. He is an expert and I
3 get to delve into his experience and what forms the
4 foundation for his knowledge and experience.

5 MR. CANET: With respect in this case with the
6 intoxicilizer.

7 MR. GILFARB: Your continued objection is noted for
8 the record.

9 MR. TALPINS: I would like to ask him about
10 extrapolation. I would like to know everything he takes
11 into consideration, and since I am sure he was an
12 officer he did that.

13 MR. CANET: I am going to continue to object to any
14 questions on field sobriety.

15 MR. TALPINS: You have a continued objection. It's
16 noted for the record. Now, let me ask my questions.

17 BY MR. TALPINS:

18 Q. Have you ever given field sobriety tests in the
19 past?

20 A. Yes.

21 Q. Do you believe if they are given properly they are
22 accurate and reliable?

23 A. Yes.

24 Q. Are you familiar with the DRE program?

25 A. Yes.

1 Q. Isn't it true that you wanted to bring the DRE
2 program to Broward County?

3 MR. CANET: Objection.

4 MR. TALPINS: You have a continued objection.

5 THE WITNESS: Answer the question?

6 MR. CANET: Yes.

7 THE WITNESS: I'm sorry. Give it to me again.

8 BY MR. TALPINS:

9 Q. Isn't it true you wanted to bring the DRE Program
10 to Broward County?

11 A. That's yes and no.

12 Q. Explain the yes and no, I guess.

13 A. I was requested to research the DRE Program in
14 order that the Broward Sheriff's Office could obtain a grant
15 for approximately one million dollars.

16 I was sent down to Dade County, and Dade County met
17 with whoever was in charge. I know I met with Al Newport on
18 several occasions. Then I went to the County Government
19 Center and spoke with whoever was in charge of obtaining the
20 grant for Dade County.

21 I worked with this individual for about three
22 months. I put a grant request in to the sheriff's office and
23 requested what we would need. And I believe Hillsborough
24 County beat the Sheriff's office out on that grant.

25 Q. Really? I didn't know that.

1 Would it be fair to say you did assist Broward's
2 effort to bring the DRE Program to Broward County?

3 A. Well, first of all, Broward County does not have a
4 DRE Program. They never had. So I can't say I assisted them
5 in bringing it there.

6 I assisted in attempting to get money on a grant of
7 one million dollars. Maybe it was like \$800,000, but it was
8 for the County. That's what I assisted in.

9 Q. Can I assume that you did that because you believed
10 the program would be beneficial?

11 A. Finance wise. When I was doing the budget for the
12 unit, absolutely. I can't tell you that I thought the
13 program was great. But I thought money purpose wise, it
14 would be excellent.

15 Q. Do you think the program is good?

16 A. I can't really comment on that. No, I don't. All
17 I know I never did the DRE Program. And all I know is Dade
18 County Program I was familiar with that, and how it was
19 administered. I can't tell you how I would have administered
20 one in Broward.

21 Q. Do you believe a trained DRE is capable and can
22 accurately and reliably determine drug impairment?

23 A. Not from my knowledge at this point.

24 Q. What is your knowledge based on?

25 A. The Dade County program. Dade County's destruction

1 and ruination of the program that was made by the National
2 government.

3 Q. What is your knowledge regarding that?

4 A. My knowledge is that the individual from the
5 University of North Florida who came down to initiate the
6 program with Dade County came back -- and as a matter of
7 fact, he stayed at my house for a week. He was asked to come
8 down by somebody from Dade County. And I can't tell you who
9 that was.

10 Q. When was this?

11 A. Probably about two and a half years ago.

12 BY MR. GILFARB:

13 Q. The person stayed at your house, what is his name?

14 A. David Wiley. He came down because Dade County
15 Records and Management were so bad that the State Attorney's
16 Office was grabbing their chest every time they tried to go
17 in court with DRE. He came down in order to facilitate and
18 help them out with the program.

19 Q. Do you believe a trained and experienced DRE can
20 accurately and reliably identify drug impairment assuming he
21 probably followed the program?

22 A. Why are we going into DRE?

23 MR. CANET: I am objecting to any questions having
24 to do with DRE. It has nothing to do with that.

25 MR. TALPINS: You have a continuing objection.

1 Do you want to answer the question?

2 MR. CANET: Objection.

3 MR. TALPINS: You have a continuing objection.

4 BY MR. TALPINS:

5 Q. Do you believe that DRE's who properly follow the
6 protocol and understand what they are doing can accurately
7 and reliably identify drug impairment?

8 A. I can't answer that.

9 Q. Let's talk about your experience.

10 MR. CANET: Let me say something else for the
11 record. We have been here since two o'clock. The
12 deposition didn't start until 2:15. He is paid up until
13 this point.

14 Until this point on, the meter is running and it's
15 \$150 bucks an hour; which you guys, I imagine, you are
16 going to pay the difference.

17 MR. GILFARB: I was there at the hearing and unless
18 something else happened at the hearing that I was
19 completely unaware of, that statement is incorrect. And
20 this deposition will continue until we are done.

21 MR. CANET: It may continue until we are done, but
22 I am telling you until this point onward it's \$150 an
23 hour, so you understand.

24 MR. TALPINS: That's not the County rate.

25 THE WITNESS: I spoke with your supervisor, whoever

1 that was. I forget who it was.

2 MR. TALPINS: Gerald Bagley?

3 THE WITNESS: I am sorry. I don't have their
4 names. I told them what my rate was. Bobby Reiff was
5 aware when I spoke to the judge. And I am telling you
6 what Bobby told me.

7 I agreed that we should have had it in Broward
8 because you guys wouldn't have to pay the travel time.
9 Your office agreed or wanted me to come down here.

10 It's an hour and a half travel time for me round
11 trip. I told Reiff and I told Mr. Canet, and I told
12 your supervisor that that means you have me for two
13 hours, and it's now 2:30.

14 If you advise me that you will see that I get paid
15 from this point on with no problem and you will
16 guarantee it, then I will stay.

17 MR. TALPINS: You will get paid in accordance with
18 what we agreed to before.

19 THE WITNESS: It's \$150 an hour port to port. I
20 have no problem. And I'll stay until midnight. If you
21 don't agree, we'll walk right now.

22 MR. GILFARB: Not only do I have an objection to
23 this ridiculous conversation, but it already has been
24 decided in court.

25 Obviously, we are going to order all the

1 transcripts since I can't trust what anybody says. I
2 need to put this on the record.

3 Number one, my understanding was that Rick was
4 going to get paid \$300.

5 MR. CANET: Were you privy to the meeting that he
6 had with your supervisor?

7 MR. TALPINS: He is going to be paid in accordance
8 with the agreement with our office.

9 MR. GILFARB: Can I speak without interruption?

10 (Off the record discussion.)

11 MR. GILFARB: On the record. You have to stay for
12 the record.

13 THE WITNESS: We are leaving.

14 MR. GILFARB: You are still on my time.

15 MR. CANET: We are leaving.

16 (Thereupon, the witness and his attorney left the room).

17 MR. GILFARB: For the record, the time is now 2:35.
18 Mr. Canet and Mr. Swope have left because they have not
19 agreed to stay and finish the deposition under the
20 following terms that we said.

21 Whatever agreement Mr. Swope reached with
22 Mr. Bagley, that would be the agreement in which he was
23 going to be paid and compensated. Because we didn't
24 know the terms of the agreement, the deponent and his
25 attorney decided to leave.

1 Additionally, the deposition started at 2:10 when I
2 arrived, when I was called from the Graham Building at
3 two o'clock. I was not told of any time constraints of
4 this deposition. And my understanding was that Rick
5 Swope was going to get paid \$300, and we were going to
6 take his deposition. The deponent has left.

7 He has forfeited his presence here by leaving, even
8 though, I asked him to stay. He wanted access to the
9 record only when he wanted access to the record and not
10 when I wanted to put things on the record. And so he
11 and his attorney left.

12 Even though, we told them repeatedly that whatever
13 agreement he made with our office and our security
14 advisor was going to be binding upon us. And they
15 refused to stay and continue the deposition because we
16 did not know the terms of that deposition.

17 (Thereupon, the deposition was concluded.)

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REPORTERS DEPOSITION CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DADE)

I, DOROTHY EDWARDS, a Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized to and did stenographically reported the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of November, 1994.

Dorothy Edwards
DOROTHY EDWARDS

STATE OF FLORIDA
COUNTY OF DADE

The foregoing certificate was acknowledged before me this _____ day of _____, 1994, by DOROTHY EDWARDS, who is personally known to me.

Notary Public - State of Florida
My Commission No.
Expires: